

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

CESAR A. CALDERON SERRA, et al.,

## Plaintiffs,

V.

**BANCO SANTANDER PUERTO RICO,  
et al.,**

## Defendants.

Civil No. 10-1906 (GAG)

## **OPINION AND ORDER**

Cesar Calderon Serra, his wife Teresita Palerm Nevares and their conjugal partnership (collectively “Plaintiffs”) bring this action against Banco Santander Puerto Rico (“BSPR”), Jose Gonzalez (“Gonzalez”), Juan Moreno (“Moreno”), Maria Calero (“Calero”), Jose Alvarez (“Alvarez”), James Rodriguez (“Rodriguez”), Hector Calvo (“Calvo”) and unnamed loan officers and insurance companies (collectively “Defendants”), seeking damages stemming from various BSPR loans that were used to purchase investments, which caused them significant financial losses. Plaintiffs assert this court has jurisdiction pursuant to 28 U.S.C. § 1331, as the claims arise out of federal law. Plaintiffs claim Defendants participated in a coordinated pattern of activity that violates 15 U.S.C. § 78g (“Regulation U”) and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (the “RICO Act”). (See Docket No. 1 at 8 & 10.)

Presently before the court are Defendants' motions to dismiss. Moreno, Alvarez and Calvo seek dismissal for insufficient service of process under Federal Rule of Civil Procedure 12(b)(5) (Docket No. 68). Plaintiffs opposed said motion (Docket No. 75) and Moreno, Alvarez and Calvo replied (Docket No. 84). BSPR filed a motion seeking dismissal of Plaintiffs' claims for failure to state a claim (Docket No. 48). Plaintiffs opposed the motion (Docket No. 63) and BSPR filed a reply (Docket No. 67). Calero, Rodriguez, and Gonzalez joined BSPR's motion and reply (Docket

1 **Civil No. 10-1906 (GAG)**

2

2 Nos. 49, 69 & 70). After reviewing these submissions and the pertinent law, the court **GRANTS**  
 3 all the motions at Docket Nos. 48, 49, 69, 70 and **GRANTS in part and DENIES in part** the  
 4 motion at Docket No. 68.

5 **I. Standard of Review**

6 **A. Insufficient Service of Process**

7 Rule 12(b)(5) allows a defendant to seek dismissal for a plaintiff's failure to sufficiently  
 8 serve the defendant with process. FED.R.CIV.P. 12(b)(5). The requirements for serving process on  
 9 an individual within a judicial district of the United States are delineated in Rule 4(e). FED.R.CIV.P.  
 10 4(e). This Rule allows a plaintiff to serve a defendant pursuant to the laws of the state in which the  
 11 defendant is located or pursuant to federal law. See Fed.R.Civ.P. 4(e)(1 & 2). A district court may  
 12 dismiss a complaint for a plaintiff's failure to effectively serve a defendant with process. See Blair  
 13 v. City of Worcester, 522 F.3d 105, 110 (1st Cir. 2008). Once the sufficiency of service of process  
 14 is challenged, the "plaintiffs have the burden of proving proper service." Rivera-Lopez v.  
 15 Municipality of Dorado, 979 F.2d 885, 887 (1st Cir. 1992).

16 **B. Failure to State a Claim Upon Which Relief Can Be Granted**

17 "The general rules of pleading require a short and plain statement of the claim showing that  
 18 the pleader is entitled to relief." Gargano v. Liberty Intern. Underwriters, Inc., 572 F.3d 45, 48 (1st  
 19 Cir. 2009) (citations omitted) (internal quotation marks omitted). "This short and plain statement  
 20 need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it  
 21 rests.'" Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

22 Under Rule 12(b)(6), a defendant may move to dismiss an action against him for failure to  
 23 state a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6). To survive a Rule  
 24 12(b)(6) motion, a complaint must contain sufficient factual matter "to state a claim to relief that is  
 25 plausible on its face." Twombly, 550 U.S. at 570. The court must decide whether the complaint  
 26 alleges enough facts to "raise a right to relief above the speculative level." Id. at 555. In so doing,  
 27 the court accepts as true all well-pleaded facts and draws all reasonable inferences in the plaintiff's  
 28 favor. Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008). However, "the tenet that a court must

1 **Civil No. 10-1906 (GAG)**

3

2 accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”  
 3 Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). “Threadbare recitals of the elements  
 4 of a cause of action, supported by mere conclusory statements, do not suffice.” Id. (citing Twombly,  
 5 550 U.S. at 555). “[W]here the well-pleaded facts do not permit the court to infer more than the  
 6 mere possibility of misconduct, the complaint has alleged-but it has not ‘show[n]’ -‘that the pleader  
 7 is entitled to relief.’” Iqbal, 556 U.S. 662, 129 S. Ct. at 1950 (quoting FED. R. CIV. P. 8(a)(2)).

8 **II. Factual and Procedural Background**

9 Plaintiffs have a custodial bank account with BSPR numbered 7CC-767545 (the “Account”).  
 10 (See Docket No. 35 at ¶ 21.) On or about January 25, 2008, BSPR informed Plaintiffs that  
 11 \$9,000,000 would be available on loan for a 30 day Libor plus 0.95% for the purchase of securities  
 12 through BSPR’s subsidiary, Santander Services. (See Docket No. 35 at ¶ 56.) Calderon signed a  
 13 series of blank loan applications, which were later filled in by bank personnel. (See Docket No. 35  
 14 at 56.) Plaintiffs claim that on January 25, 2008, Defendants traded \$5,000,000 worth of securities  
 15 in their names. (See id. at ¶ 20.) On that date, prior to the transaction, Plaintiffs’ account had a  
 16 balance of zero. (See id.) On January 31, 2008, BSPR issued a loan to Plaintiffs to cover the  
 17 January 25th transaction. (See Docket No. 35 at ¶ 23.) Plaintiffs claim they never deposited any of  
 18 their own money in the Account and that the sole source of money for the Account was on loan from  
 19 BSPR. (See Docket No. 35 at ¶ 24.) On February 21, 2008, Defendants traded another \$1,000,000  
 20 from the Account in Plaintiffs name. (See Docket No. 35 at ¶ 25.) At the time of this transfer, the  
 21 Account was completely devoid of funds. (See id. at ¶ 26.) This process occurred four additional  
 22 times, without Plaintiffs ever depositing any of their own funds into the Account. (See Docket No.  
 23 35 at ¶¶ 27-28.)

24 Plaintiffs argue this process violates 15 U.S.C. § 78g (“Regulation U”) because Defendants  
 25 did not meet the minimum level of margin requirements. (See Docket No. 35 at ¶¶ 30-32.)  
 26 Plaintiffs allege Defendants granted and distributed the loans with knowledge that such loans were  
 27 in violation of the applicable statutes and regulations. (See Docket No. 35 at ¶ 34.) Plaintiffs allege  
 28

1 **Civil No. 10-1906 (GAG)**

4

2 Defendants committed such violations in order to increase their profits. (See Docket No. 35 at ¶ 35.)

3 Plaintiffs claim they were never in control over the funds as the funds were sent directly to  
4 Santander Services. (See Docket No. 35 at ¶ 52.) Plaintiffs do not recall signing a pledge or other  
5 document securing the transactions, pursuant to banking industry custom. (See Docket No. 35 at  
6 ¶ 57(d).) At the time of the complaint, Plaintiffs were not in default on any payment to BSPR. (See  
7 Docket No. 35 at ¶ 45.) As of August 31, 2010, Plaintiffs suffered losses estimated to be  
8 \$2,947,420.25 due to the decreased value of these securities. (See Docket No. 35 at ¶ 55.)

9 The original complaint was filed on September 20, 2010. (See Docket No. 1.) The court  
10 granted leave to file an amended complaint on August 3, 2011. (See Docket No. 26.) Plaintiffs  
11 motioned to file a second amended complaint, which was granted by the court on November 1, 2011.  
12 (See Docket No. 32.) The second amended complaint was filed on November 2, 2011. (See Docket  
13 No. 35.)

14 Summons for Defendants were issued on November 7, 2011. (See Docket No. 37.) On  
15 November 9, 2011, Plaintiffs requested an extension of time to serve Moreno. (See Docket No. 39.)  
16 The court granted the extension until January 30, 2012. (See Docket No. 41.) On November 22,  
17 2011, Plaintiffs requested an extension of time to serve Gonzalez, Alvarez, Rodriguez and Calvo,  
18 which was granted that same day. (See Docket Nos. 44 & 45.) Plaintiffs sought service by  
19 publication for Moreno, Alvarez and Calvo on January 30, 2012. (See Docket No. 55.) This last  
20 motion was denied by the court for failure to include a first-hand affidavit as to the efforts used to  
21 locate said defendants. (See Docket No. 56.) The motion for service by publication was renewed  
22 on February 1, 2012 and included an affidavit by a private investigator who attempted to locate these  
23 defendants. (See Docket No. 57.) This renewed motion for service by publication was granted by  
24 the court. (See Docket No. 58.) Plaintiffs informed the court on March 7, 2012, that publication had  
25 occurred on February 9, 2012 and attached an affidavit of an employee of El Nuevo Dia attesting  
26 that such notice was published in said newspaper. (See Docket No. 71.) The court noted this  
27 informative motion on March 7, 2012. (See Docket No. 72.)

28

1 **Civil No. 10-1906 (GAG)**

5

2 **III. Discussion**3 **A. Insufficient Service of Process**

4 Rule 4(e) allows a plaintiff to “follow state law for serving a summons in an action brought  
 5 in courts of general jurisdiction in the state where the district court is located or where service is  
 6 made.” FED.R.CIV.P. 4(e)(1). In Puerto Rico, a plaintiff may serve a defendant through publication  
 7 if certain criteria are met. See P.R. Laws Ann. tit. 32, app. III. R. 4.5.<sup>1</sup> The court may issue such an  
 8 order when the person to be served is outside of Puerto Rico and when the person cannot be located  
 9 within Puerto Rico after good-faith attempts have been made to locate the defendant. See id. The  
 10 plaintiff must provide the court with an affidavit stating the steps taken to locate the defendant in  
 11 order to receive permission to serve by publication. See id. Once the court has granted service by  
 12 publication, the plaintiff shall publish the summons one time in a newspaper of general circulation  
 13 within Puerto Rico. See id. Within ten days of this publication, the plaintiff shall send a copy of the  
 14 summons and the complaint, by certified mail with acknowledgment of receipt, to the defendant’s  
 15 last known address. See id. In the event the plaintiff is unable to ascertain a known address of the  
 16 defendant, the plaintiff may avoid sending the summons and the complaint by submitting a sworn  
 17 statement which states the steps taken to ascertain a previous address. See id.

18 In this case, Moreno, Alvarez and Calvo argue Plaintiffs complied with most terms of this  
 19 rule, except for publishing the edict and sending these defendants a copy of the summons and the  
 20 complaint. (See Docket No. 68 at ¶ 6.) Specifically, Defendants argue Plaintiffs had the duty to  
 21 either send the summons and complaint to the last known address of Moreno, Alvarez and Calvo,

---

22  
 23  
 24 <sup>1</sup> The Puerto Rico Rules of Civil Procedure were amended in 2009. See P.R. Law Ann. tit.  
 25 32, app. V. Puerto Rico Rule of Civil Procedure 4.6 (“Rule 4.6”) provides for service by  
 26 publication. See P.R. Laws Ann. tit. 32, app. V. R. 4.6. However, as of the day of this opinion,  
 27 there is no English translation for the 2009 Rules. The undersigned, being fully bilingual, notes the  
 28 pertinent part of Rule 4.6 corresponds to Rule 4.5 of the 1979 Puerto Rico Rules of Civil Procedure.  
See P.R. Laws Ann. tit. 32, app. III, Rule 4.5. Accordingly, for purposes of this motion, the court  
 will cite to the English translation of Rule 4.5. Notwithstanding, Defendants’ shall on or before  
 August 10, 2012 file a certified translation of Rule 4.6 for the record.

1 **Civil No. 10-1906 (GAG)**

6

2 or submit a sworn statement to the court explaining the steps Plaintiffs took in order to ascertain the  
 3 last known address of these defendants, even though that search was ultimately fruitless. (See  
 4 Docket No. 84 at 3.) Plaintiffs claim they satisfied this portion of the rule by submitting the affidavit  
 5 of Andre Amador (“Amador”), a private investigator hired by Plaintiffs to locate the pertinent  
 6 defendants. (See Docket No. 57-1.)

7 Before ruling on the motion, the court must first clarify that it is Plaintiffs’ burden to prove  
 8 it has complied with the rule. See Rivera-Lopez, 979 F.2d at 887. However, the supporting  
 9 documents Plaintiffs provided to the court seeking leave to serve by publication may be sufficient  
 10 to demonstrate Plaintiffs could not locate a last known address. The rules do not require Plaintiffs  
 11 to make a separate showing with separate documentation when opposing a motion to dismiss for  
 12 ineffective service of process. The affidavit Plaintiffs provided to the court seeking leave to serve  
 13 by publication may be used by Plaintiffs to demonstrate they made a good-faith effort to locate the  
 14 defendants, but it was “impossible to find any known address of the defendant.” P.R. Laws Ann.  
 15 tit. 32, app. III, R. 4.5.

16 Turning to the affidavit itself, the court may quickly dispense with defendants Moreno and  
 17 Calvo because the affidavit contains a last known address for these defendants. The affidavit  
 18 contains the address and the years of the “Former known address” for both Moreno and Calvo. (See  
 19 Docket No. 57-1 at 2.) Therefore, Plaintiffs had the duty to send a copy of the summons and  
 20 complaint to this address pursuant to Rule 4.6. Plaintiffs failure to do so requires the court to  
 21 **DISMISS** the claims against Moreno and Calvo.

22 In the case of Alvarez, the affidavit does not contain any known address despite the attempts  
 23 of Amador. (See Docket No. 57-1 at 2.) The affidavit states Amador searched “worldwide person(s)  
 24 location programs and criminal record check with local and federal law enforcement agencies, to  
 25 include, U.S. Bankruptcy Court.” (See id. at 1.) Amador cites the lack of personal information  
 26 regarding Alvarez, as well as how common Alvarez’s name, as reasons why his search was  
 27 ultimately fruitless. (See id. at 2.)

28 This affidavit satisfies Rule 4.6. It states the steps taken by Plaintiffs to locate an address for

1 **Civil No. 10-1906 (GAG)**

7

2 Alvarez and explains why Plaintiffs were ultimately unsuccessful. Plaintiffs made a good-faith effort  
 3 to locate an address for Alvarez, but could not. Therefore, Plaintiffs are excused from complying  
 4 Rule 4.6 as it pertains to sending a copy of the summons and complaint to Alvarez's last known  
 5 address.

6 Therefore, the court **GRANTS** the motion to dismiss as to Moreno and Calvo, but **DENIES**  
 7 the motion as to Alvarez.

8 **B. Failure to State a Claim**

9 **1. Regulation U**

10 Plaintiffs' first cause of action arises under Regulation U. (See Docket No. 35 at 8.)  
 11 Defendants seek dismissal of this claim because Regulation U does not provide for a private right  
 12 of action. (See Docket No. 48 at 6.) Plaintiffs do not address Defendants' assertion, rather they  
 13 state, "no private action was started solely under this regulation" and "[t]he violation of Regulation  
 14 U should be entertained as bank fraud committed by Codefendants in order to further the RICO  
 15 scheme." (See Docket No. 63 at 2 & 7.) The First Circuit has not ruled on this issue, but other  
 16 circuits have and their analysis is highly persuasive. See Useden v. Acker, 947 F.2d 1563, 1582  
 17 (11th Cir. 1991); Bennett v. U.S. Trust Co. of New York, 770 F.2d 308, 311-12 (2d Cir. 1985);  
 18 Bassler v. Cent. Nat. Bank in Chicago, 715 F.2d 308, 311-12 (3d Cir. 1983); Gilman v. Fed. Deposit Ins.  
 19 Corp., 660 F.2d 688, 692-93 (6th Cir. 1981). In each of these cases, the circuit court relies upon Cort  
 20 v. Ash, 422 U.S. 66, 78 (1975), as controlling precedent to determine whether an implied right of  
 21 action exists within a statute.

22 The First Circuit also cites to Cort as controlling precedent when ruling on whether a statute  
 23 provides an implicit right of action. See San Juan Cable LLC v. Puerto Rico Tel. Co. Inc., 612 F.3d  
 24 25, 32 (1st Cir. 2010). As such, this court believes Cort is the proper precedent to use and the result  
 25 would not differ from that of the Second, Third, Sixth and Eleventh Circuits. Therefore, the court  
 26 **GRANTS** Defendants' motion to dismiss Plaintiffs' claim arising under Regulation U.

27 **2. RICO**

28 Plaintiffs next claim a right of action under the RICO Act. (See Docket No. 35 at 10.)

1 **Civil No. 10-1906 (GAG)**

8

2 Defendants seek dismissal of this claim by arguing the passage of the Private Securities Litigation  
 3 Reform Act (“PSLRA”) has preempted Plaintiffs’ ability to sue under the RICO Act. (See Docket  
 4 No. 48 at 7.) To date, this issue has not been ruled upon by the First Circuit.

5 In order to allege a civil RICO Act claim, Plaintiffs must allege the commission, the attempt,  
 6 or conspiracy to commit a predicate act. See *Mendez Internet Mgmt. Sers., Inc. v. Banco Santander*  
 7 *de Puerto Rico*, 621 F.3d 10, 14 (1st Cir. 2010). These acts constituting a predicate act are statutorily  
 8 defined and listed in 18 U.S.C. § 1961(1). Since 1995, when the PSLRA was passed and the RICO  
 9 Act was amended, securities fraud is no longer a predicate act under Section 1961(1). See *Mathews*  
 10 *v. Kidder, Peabody & Co., Inc.*, 161 F.3d 156, 164 (3d Cir. 1998); *Ostler v. Codman Research Grp.,*  
 11 *Inc.*, CIV. 98-356-JD, 1999 WL 1059684, at \* 6 (D.N.H. Apr. 20, 1999); 18 U.S.C. § 1964(c). As  
 12 these other courts have held, allegations of securities fraud no longer serve as predicate acts to civil  
 13 RICO claims. See 18 U.S.C. § 1964(c) (“[N]o person may rely upon any conduct that would have  
 14 been actionable as fraud in the purchase or sale of securities to establish a violation of section  
 15 1962.”).

16 Plaintiffs argue the complaint does not allege violations involving the purchasing and selling  
 17 of securities. (See Docket No. 63 at 6.) Rather, Plaintiffs claim the acts described in the complaint  
 18 constitute bank fraud. (See *id.*) Bank fraud is a proper predicate act under the RICO Act to sustain  
 19 an action.

20 In looking at the complaint, it is clear Plaintiffs are seeking compensation for losses suffered  
 21 from the purchase and sale of securities. Plaintiffs’ damages estimate is based on the lost value of  
 22 the securities they purchased and currently own. All loans in this case were secured for the  
 23 purchasing of securities. All monies were used to purchase securities. Plaintiffs argue the complaint  
 24 alleges bank fraud violations prior to the purchase of the securities, rather than violations pursuant  
 25 the purchasing and selling of securities. Reading the complaint as a whole, the court disagrees. This  
 26 is this action stems from the purchasing and selling of securities and is therefore preempted by PSLRA.  
 27 Disassociating the acts leading to the purchase and sale of securities and the acts of purchasing and  
 28 selling securities is not appropriate in this case. It is abundantly clear that all efforts were made and

1 **Civil No. 10-1906 (GAG)**

9

2 procedures followed for the goal of purchasing and selling securities. The court finds Plaintiffs'  
3 RICO Act claim to be preempted by the PSLRA. Therefore, the court **GRANTS** Defendants'  
4 motion to dismiss.

5 **IV. Conclusion**

6 For the reasons set forth above, the court **GRANTS** Defendants' motions to dismiss at  
7 Docket Nos. 48, 49, 69, and 70. The court **GRANTS in part** and **DENIES in part** the motion to  
8 dismiss at Docket No. 68. However, as the court has determined the complaint fails to state a claim  
9 upon which relief may be granted as to Defendants, the court *sua sponte* dismisses Plaintiffs' claims  
10 against Alvarez as well. All claims against Defendants are hereby **DISMISSED**.

11  
12 **SO ORDERED.**

13 In San Juan, Puerto Rico this 30th day of July, 2012.

14 *s/ Gustavo A. Gelpí*

15 GUSTAVO A. GELPI  
16 United States District Judge

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28